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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

Number 226

BEN W. FORTSON, JR., as Secretary of State
of the State of Georgia,
Petitioner,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III,
and JAMES EDWARD MANGET,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit, Before Judgment.

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June 26, 1964.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Fifth Circuit, Before Judgment.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, your Petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the above case pending in that Court.

OPINION BELOW.

The opinion of the Three-Judge District Court (R. 55-67) is reported at 228 F. Supp. 259. The final judgment of the District Court (R. 67-69) is unreported.

JURISDICTION.

This is a suit brought under 28 U. S. C. 1343 and 2201 by three registered voters of the Atlanta metropolitan area in the United States District Court for the Northern District of Georgia against the Secretary of State of Georgia and two local election officials seeking to invalidate, on Federal constitutional grounds, a State law requiring the county-at-large election of State senators in counties apportioned plural senatorial representation, and to enjoin the defendants from complying with the provisions of the challenged law. A Three-Judge District Court was convened under 28 U. S. C. 2281 to hear and determine this suit.

In an opinion rendered on March 27, 1964 (R. 55-67), and in final judgment rendered on April 6, 1964 (R. 67-69), the Three-Judge District Court granted the declaratory relief sought by the plaintiffs but denied the injunctive relief on the ground that there "is no indication that defendants will not follow the law as declared" (R. 66). On April 14, 1964, the notice of appeal to the United States Court of Appeals for the Fifth Circuit from such opinion and judgment was filed with the Clerk of the District Court (R. 71), and the record on appeal was docketed in the Court of Appeals as No. 21,587 on June 2, 1964. The case has not been heard, submitted to, or decided by the Court of Appeals.

The Petitioner has also filed a direct appeal to this Court from the opinion and judgment of the District Court under 28 U. S. C. 1253 and 2101 (b). **Fortson v. Dorsey, et al.**, Supreme Court of the United States, Oct. Term, 1963, No. 1213.

This case presents a unique jurisdictional issue because, on one hand, the relief sought in the complaint (R. 1-10)

demanded the convocation of the Three-Judge District Court to hear and determine the case, while on the other hand, the denial of injunctive relief (which was theoretically favorable to the Petitioner) places in doubt the right of the Petitioner to pursue a direct appeal to this Court under 28 U. S. C. 1253. In his Jurisdictional Statement,[1] the Petitioner has taken the position that a direct appeal is permissible under 28 U. S. C. 1253 because the Three-Judge Court was properly convened.

In the event this Court disagrees with the above contention and finds that only the Court of Appeals has jurisdiction of an appeal from the judgment of the District Court, then the Petitioner respectfully invokes the jurisdiction of this Court under 28 U. S. C. 1254 (1) and 2101 (e) to review the judgment of the District Court by writ of certiorari. **Turner v. City of Memphis** (1962), 369 U. S. 350, 7 L. ed. 2d 762, 82 S. Ct. 805; **Stainback v. Mo Hock Ke Lok Po** (1949), 336 U. S. 368, 93 L. ed. 741, 69 S. Ct. 606.

QUESTIONS PRESENTED.

A. Whether a state legislature, containing fifty-four senators, may divide a state into fifty-four senatorial districts according to population, some districts containing one or more counties and some counties containing two or more districts, and require that the senators from the districts containing one or more counties be elected by the voters within their respective districts, while also requiring that the senators from the multi-district counties be elected by the voters within their respective counties.

B. Whether that part of Section 9 of the Senatorial Reapportionment Act of the General Assembly of the

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[1] *Fortson v. Dorsey, et al.*, Supreme Court of the United States, Oct. Term, 1963, No. 1213, pp. 2-4.

State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides that "the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located", denies to the Appellees the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 9 of the Senatorial Reapportionment Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides in pertinent part that:

> Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, **except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located.** (The emphasis indicates the language invalidated by the District Court.)

Paragraph I of Section II of Article II of the Constitution of the State of Georgia (Ga. Code Ann., Sec. 2-1401), as ratified by the people on November 6, 1962, provides that:

> (a) Number and Apportionment of Senators. The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change Senatorial Districts and to provide for the election of senators from each Senatorial

District, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable.

(b) Interim Ratification. An Act providing for the reapportionment of the State Senate, enacted by the General Assembly at the extraordinary Session which convened on September 27, 1962, which Act made special provision for the election of Senators for the 1963-64 term and all elections held thereunder, are hereby ratified.

STATEMENT.

This is an appeal from the final judgment of a Three-Judge District Court for the Northern District of Georgia granting summary judgment against the Secretary of State of the State of Georgia and two local election officials in an action brought by three registered voters to invalidate, on Federal constitutional grounds, a State law requiring the county-at-large election of State senators in counties apportioned plural senatorial representation, and to enjoin such officials from complying with the provisions of the challenged law. The action originated out of the following circumstances.

In **Toombs v. Fortson,**[2] a three judge district court determined on May 25, 1962, that so long as the General Assembly of Georgia "does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."[3]

On September 14, 1962, the Governor of Georgia issued his Proclamation[4] convening the General Assembly in

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[2] (D. C.—N. D. Ga.—1962), 205 F. Supp. 248.

[3] Id., p. 257, l. col. (5). This determination was reiterated in a supplemental decision, dated September 5, 1962, which is unreported.

[4] Ga. Laws, Sept.-Oct., 1962, Extra Sess., pp. 3-5.

extraordinary session on September 27, 1962, for the purpose, inter alia, of considering and enacting laws relating to the reapportionment of the Senate within the requirements of the **Toombs** case. Upon convening, the General Assembly expeditiously went about the business of considering the reconstitution of the Senate, which culminated on October 5, 1962, in the enactment into law of the Senatorial Reapportionment Act[5] apportioning the membership of the Senate entirely on a population basis as required by the **Toombs** case.

The Act divided the State into fifty-four senatorial districts, twenty-one of which are wholly contained within the State's seven most populous counties.[6] The Act requires that "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located."[7]

Also during this extraordinary session, the General Assembly, by the requisite two-thirds constitutional majority in each House, adopted a Resolution[8] proposing the following Amendment to the State Constitution:

> Section 1. Article III, Section II, Paragraph I of the Constitution is hereby amended by striking said Paragraph in its entirety and inserting in lieu thereof the following:
>
> "Paragraph 1. (a) Number and Apportionment of Senators—The Senate shall consist of fifty-four (54)

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[5] Id., pp. 7-31.

[6] The map on page 32A of the Record shows the senatorial districts and the population per district.

[7] Ga. Laws, Sept.-Oct., 1962, Extra Sess., p. 30, 1st par.

[8] Id., pp. 51-52. Approved October 8, 1962.

members. The General Assembly shall have authority to create, rearrange and change Senatorial Districts and to provide for the election of senators from each Senatorial District, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable.

"(b) Interim Ratification—An Act providing for the reapportionment of the State Senate, enacted by the General Assembly at the extraordinary Session which convened on September 27, 1962, which Act made special provision for the election of Senators for the 1963-64 term and all elections held thereunder, are hereby ratified."

Pursuant to this Resolution, the ballots and ballot labels used in the General Election held on November 6, 1962, contained the question as to whether the proposed Amendment should be ratified. At the Election, the people ratified such Amendment by a vote of 119,502 for and 75,598 against.[9] The Amendment carried in each of the multi-senatorial district counties except Bibb (R. 23-28).

On January 24, 1964, State Senator MacIntyre of the Fortieth Senatorial District (contained within Fulton County) and two registered voters of Fulton and DeKalb Counties, pursuant to 28 U. S. C. 1343 and 2201, filed a complaint in the United States District Court for the Northern District of Georgia (R. 1). This complaint alleged the adoption of the above statutory and constitutional provisions and sought the convocation of a three-judge district court pursuant to 28 U. S. C. 2281 and 2284, and asked that such court enter a judgment: declaring that the State Law requiring the county-at-large election of State senators in the seven counties apportioned plural senatorial representation to be in violation of the Four-

[9] Ga. Laws, 1963, pp. 844-847. (See also the Affidavit of the Secretary of State (R. 17-23).

teenth Amendment to the Federal Constitution; and requiring that the senators from the seven multi-district counties be elected only by the voters of their respective districts; and enjoining the Petitioner and the Ordinaries (election officials) of Fulton and DeKalb Counties from complying with the provisions of such State law (R. 7-9).

On February 18, 1964, the Petitioner filed his answer and defense admitting the allegations of fact contained in the complaint, but denying that the Respondents were entitled to any relief (R. 2), and on March 6, 1964, he moved for the entry of summary judgment dismissing the action (R. 16). A cross motion for summary judgment was filed by the Respondents on March 13, 1964 (R. 33).

After oral argument, the District Court, on March 27, 1964, granted summary judgment in favor of the Respondents. In its opinion, the Court concisely stated the competing contentions of the parties in the following terms (R. 60):

> The (Respondents) state that the representatives elected in the plural district counties are not elected by those whom they represent since voters so situated do not have the opportunity of choosing their own senator, but must join with others to choose a group of senators. They assert, without contradiction, on the basis of the population of the various districts in Fulton County that only eighteen percent of the voters in the other six districts of that county could nullify the unanimous choice of the voters in the 34th Senatorial District and thrust a representative upon voters of that district for whom no one at all within the district had voted. Of course, this is carried to an extreme but it cannot be disputed that the selection of a senator from these districts is not within the control and province of the voters of the

separate districts. By way of contrast, this is not the case with voters residing in districts not situated in plural district counties.

The Secretary of State urges that county-wide voting is a rational and permissive classification in the interest of county government. He points to the fact that plaintiffs have a political remedy and have not availed themselves of it even though one of the plaintiffs is a member of the State Senate. It is argued that there has been no dilution or debasement of the votes of plaintiffs since the whole of the fractional parts, i. e., their being able to vote for more than one senator, is equal to the vote of one residing in a district where he votes for one senator only.

The District Court then drew an analogy from **Gray v. Sanders**[10] and determined that the challenged law created an invidious discrimination (R. 62). On April 6, 1964, the Court entered final judgment in accordance with its opinion (R. 67).

One of the curious aspects of this case is the fact that the complaint was filed during the early part of the 1964 Regular Session of the General Assembly[11], and that the Respondents, one of whom is a State senator, or any other member of the General Assembly, have made no effort to pass legislation at either the 1963 or 1964 Regular Sessions of the General Assembly to amend the State Senatorial Reapportionment Act so as to require senators in multi-district counties to be elected within their respective districts (R. 28-32). The chance of such legislation being adopted would appear to be quite good because it would only affect seven counties and there apparently would be

[10] (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801.

[11] The General Assembly had convened in regular session on January 13, 1964, pursuant to Art. III, Sec. IV, Par. III of the St. Const. (Ann. Code, Sec. 2-1603).

no urban-rural conflict over such an amendment. This likelihood was recognized by Circuit Judge Bell at the hearing held before the District Court on March 17, 1964. The Judge stated that "I have no doubt this statute would be changed in the Legislature if somebody would get over there and make some effort to do it" (R. 43).

REASONS FOR GRANTING THE WRIT.

This case concerns the method of electing twenty-one of Georgia's fifty-four Senators at the General Election to be held on November 3, 1964.[12] In Georgia, the primaries scheduled for September 9, 1964,[13] are an integral part of the State's election machinery. In these primaries, the Democratic Party will nominate its candidates for the office of Senator and the Republican Party will nominate some of its candidates for such office. If these twenty-one Senators are required to be elected county-at-large on November 3, 1964, then those seeking party nomination in these primaries must also be nominated county-at-large.[14] Therefore, it is obvious that the public interest requires an immediate authoritative decision of the issue presented by this case which should be rendered by this Court without delay. The substantiality of this issue is illustrated by the following considerations.

A. No Mathematical Devaluation of the Vote.

The State Senatorial Reapportionment Act has allotted the voters of Fulton County seven Senators, the voters of Chatham and DeKalb Counties three Senators each, and the voters of Bibb, Cobb, Muscogee and Richmond Counties two each. The relief sought in the complaint affects only

[12] Sec. 34-802 of the Ga. Election Code, approved June 24, 1964.

[13] Id., Sec. 34-801.

[14] Id., Sec. 34-1007 (a).

these seven most populous counties and is predicated upon the assumption that each of these counties had been apportioned the full number of senators required by its population. Consequently, all parties agree that it is legal for each district to elect one senator. The sole issue presented by this case is whether it is legal for the senators from the multi-district counties to be elected county-at-large.

The present apportionment of both Houses of the General Assembly is predicated on the political autonomy of the counties. The people of Georgia through constitutional ratification have chosen to regard the county as an indivisible electoral unit in the election of the membership of the General Assembly. Consequently, the senators from those counties entitled to plural senatorial representation are elected county-at-large. The objective of such an at-large election is rational and intelligible because it stimulates unity and harmony within the senatorial delegation in seeking the attainment of the political goals of the county electorate. This position does not rest upon any theory of county sovereignty, or upon any analogy between county and state, but merely upon the fact that county government over a period of years has produced an electoral homogeneity worthy of reflection in legislative representation.

The challenged method of electing senators in this case does not produce any mathematical devaluation of the vote. For example, let us compare the status of a Fulton County voter with one who resides in a rural district electing a single senator. The Fulton voter is a part of an electorate which is approximately seven times larger than the electorate of which the rural voter is a part, however, the Fulton County voter has the right to vote for seven senators whereas the rural voter may only vote for one. Theoretically, the rural voter would have a

greater influence upon his single senator than the Fulton voter would have upon any one of his seven senators, but the latter's aggregate influence upon each of his senators would equal the rural voter's influence upon his single senator. In other words, the Fulton voter has an advantage in being able to vote for seven senators, but this advantage is offset by his being a part of the large electorate necessary to support the representation of seven senators.

Another approach is helpful in analyzing this matter. In **Baker v. Carr,**[15] **Gray v. Sanders,**[16] **Westberry v. Sanders,**[17] and in the state legislative apportionment cases decided on June 15, 1964,[18] this Court has espoused its "one man-one vote" formula of political equality. The most exact proportionate representation under this formula would be secured by making a single district of the State and electing all of the senators by the people at-large. Each voter would then have his absolute and equal weight with every other voter in selecting the senators. This arrangement would apparently be legal although the electorate would be greatly inconvenienced in attempting to intelligently fill fifty-four Senate seats. However, there would be no doubt that the "one man-one vote" formula had been applied with mathematical exactitude.

It is generally recognized that a state may apportion its legislative houses according to population by dividing

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15 (1962) 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691.

16 (1963) 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801.

17 (1964) 376 U. S. 1, 11 L. ed. 2d 481.

18 *Reynolds v. Sims*, No. 23; *Vann v. Baggett*, No. 27; *McConnell v. Baggett*, No. 41; *WMCA, Inc., v. Lomenzo*, No. 20; *Lucas v. The Forty-Fourth General Assembly of the State of Colorado*, No. 508; *The Maryland Committee for Fair Representation v. Tawes*, No. 29; *Davis v. Mann*, No. 69; and *Roman v. Sincock*, No. 307.

the state into districts containing substantially equal populations and that such an apportionment would not violate the Equal Protection Clause. However, due to the never-ceasing occurrence of births, deaths and migrations, it is impossible to divide the State into fifty-four districts containing precisely equal populations. Therefore, in districting we are forced to accept the imprecise standard of substantial equality of population among the districts because no two districts could be or could long remain exactly equal to each other in population. Therefore, the voters in the lesser populated districts would have a slight, though permissible, political advantage over those voters in the more populous districts. Obviously, some discrimination is always inherent in districting.

In carrying this thinking a step further, let us consider the Fulton County Districts. This Court may judicially know that according to the 1960 Federal Census the Fulton Districts range in population from a low of 74,834 in the 40th (Respondent MacIntyre's) to a high of 82,888 in the 35th (R. 32A). Consequently, if senators were elected only in their districts, then the voters of the 40th would have a stronger political voice in the Senate than the voters of the 35th. If, on the other hand, the senators are elected county-at-large, then these variations in political strength among the voters within the county would be eliminated and precise equality would reign county-wide.

According to the 1960 Census, no two of Georgia's fifty-four senatorial districts have equal populations (R. 32A). This results in there being fifty-four shades of permissible discrimination in voting strength among the districts. However, if the twenty-one senators assigned to the seven multi-district counties are elected county-at-large, then these shades of permissible discrimination are reduced to forty. All parties agree that the election of senators within their districts is not invidiously discriminatory ir-

respective of the fifty-four permissible shades of discrimination. Therefore, why would not the challenged method of electing the Senate, which is less discriminatory, offend the Equal Protection Clause?

B. No Invidious Discrimination Between Single and Multi-Member Districts.

As we have seen, the State Senatorial Reapportionment Act divided the State into fifty-four senatorial districts and, by virtue of requiring at-large elections in multi-district counties, into forty senatorial constituencies. In effect, the Bill divided the State into thirty-three single-member districts and seven multi-member districts. This districting results in the creation of **two** differences in treatment among the voters of the State in the election of senators. **First**, voters in the more populous districts have the opportunity of electing plural senatorial representation, while the voters in any other district may only elect the single senator apportioned to them. **Second**, the voters of a district within a county having plural senatorial representation are not permitted to wholly elect a senator to represent only their district, but are required to join with the voters of the other districts within the county in electing the senators assigned to the county.

As to the first difference, it is clear that the combination of single and multi-member districts in structuring one or both chambers of a bicameral legislature is widely practiced. Maurice Klain, in his work entitled "A New Look at the Constituencies: The Need for a Recount and a Reappraisal,"[19] demonstrates the prevalence of multi-member representative districts among the State legislatures. He states that:

> Only nine states choose all legislators in single-member elections: California, Delaware, Kansas, Ken-

[19] 49 American Political Science Review 1105 (1955)

tucky, Missouri, Nebraska, New York, Rhode Island, and Wisconsin. Formerly, such states were fewer; most of the time, nonexistent.[20]

Of 1,841 senate seats in 1954 only 221, a trifle over 12 per cent, are contested in multi-member ballotings. But these overall figures, lumping together 48 legislative bodies of different sizes, conceal the number, proportion, and identity of states which elect senators on a multi-member basis. There are 16 such states. . . . If Alaska enters statehood with its present legislative forms, it will end Arizona's distinction as the only state electing all senators on a multi-member schedule. Hawaii chooses just one of 15 senators in a single-member election.[21]

A panoramic view of the 48 houses (of representatives), including Nebraska's single chamber, reveals that (representatives elected by multi-member districts) add up to more than 45 per cent of the seats—2,626 of 5,762—and are distributed among three-fourths of the states. The 12 states which elect no multiple-district representatives are the nine first named above, plus Arizona, Utah, and Vermont.[22]

Among the 36 states which contain them, the 2,616 (representatives elected by multi-member districts) amount to more than 58 per cent, outnumbering nearly three to two the 1,870 representatives elected in single-member districts.[23]

Hawaii and Alaska, like three of the states, name all representatives in multiple elections.[24]

In view of these statements and other data supplied by Klain, it is clear that the practice of combining both

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[20] Id. p. 1106, last par.

[21] Id., p. 1107, 2d par.

[22] Id., p. 1108, last par.

[23] Id., p. 1109, 2d par.

[24] Id., p. 1111, 2d par.

single and multi-member districts, or multi-member districts containing varying numbers of members, in structuring a legislative chamber, is and has been a widely prevalent practice among the States. Consequently, it is significant that none of the legislative apportionment cases and commentaries spawned by **Baker v. Carr**, of which counsel have knowledge, have condemned *per se* the employment of multi-member districts in such fashions. Rather, the attention of these courts and writers has been directed toward one basic question—whether the legislative apportionment under consideration reflects an irrational debasement of voting strength.

Furthermore, federal courts have frequently approved apportionments of legislative chambers which were structured by the combination of single and multi-membered districts. **Moss v. Burkhart** (D. C.—W. D. Okl.—1963), 220 F. Supp. 149, aff'd, sub nomine, **Williams v. Moss**, No. 476, this Term; and **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601. Compare: **Baker v. Carr** (D. C.—M. D. Tenn.—1963), 222 F. Supp. 684. The legitimacy of this structuring was recognized by this court in **Reynolds v. Sims** (No. 23, this Term), wherein it is stated that "One body could be composed of single-member districts while the other could have at least some multi-member districts" (32 L. W. 4547, l. col., last par.).

In **Davis v. McCarty**,[25] the Oklahoma Supreme Court had under review State laws reapportioning the bicameral Oklahoma Legislature for the purpose of determining their compliance with State constitutional formulas. The State constitution required that the State be divided into forty-four senatorial districts, "each of which shall elect one

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[25] Okla. Supreme Ct.—No. 49,496—decided Nov. 6, 1963. The Court granted no relief in this case because of the decision in *Moss v. Burkhart* (D. C.—W. D. Okl.—1963), 220 F. Supp. 149, aff'd, sub Nomine, *Williams v. Moss*, No. 476, this Term.

senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county in addition to the forty-four senators and the whole number to that extent."[26]

In construing this constitutional provision the Court held that "Where a county is apportioned two or more Senators because of the population factor, such senators may be elected by the voters at large in said county or from Senatorial districts therein where such districts are established according to law."[27] The Court further stated that:

> In **Jones v. Freeman** (1943), 193 Okl. 554, 146 P. 2d 564, we said that whether the additional senators from Oklahoma and Tulsa counties must be elected from separate districts within these counties, or at large by the voters of the counties, is not clear. We held that either method would be permissible, so long as substantial equality prevails.

In **Moss v. Burkhart,**[28] the district court reapportioned the Oklahoma legislature by judicial decree. The decree apportioned the senators among the various counties according to population and concluded with the proviso[29] that "until the Legislature, as apportioned hereunder, shall by appropriate legislation prescribe the boundaries of the Districts, within any one County of the State entitled to elect more than one Senator, under the provisions of this Order, the candidates for such senatorial offices

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[26] Okla. Const., Art. 5, Sec. 9 (a).

[27] Syllabus, 4th par.

[28] (D. C.—W. D. Okl.—July 17, 1963), 220 F. Supp. 149, aff'd sub nomine, *Williams v. Moss*, No. 476, this Term.

[29] Id., p. 157, 1. col., last par.

shall be nominated and elected at large within such Counties." The decree apportioned the representatives in the same manner and again concluded with the proviso[30] that "until the Legislature, as apportioned hereunder, shall by appropriate legislation prescribe the boundaries of the Districts, within any one County of the State entitled to elect more than one Representative, under the provisions of this Order, the candidates for such representative office shall be nominated and elected at large within such Counties."

Obviously, the decree did not place the reapportioned legislature under an affirmative duty to district the counties having plural representation. Therefore, the court in effect upheld the same method of electing representatives which is attacked in this action.

Furthermore, the latest **Baker v. Carr** district court decision[31] impliedly upholds the at-large election of senators in the counties assigned plural senatorial representation. The Senate committee justified this method of election in the following terms:[32]

> "The Tennessee Constitution forbids that any county shall be divided in forming a senatorial district. As a practical matter this means that every voter in Shelby County will be entitled to vote for and participate in the election of **five** senators; and the voter in Davidson County in the election of three senators. This provision assures to the voters in such counties the practical opportunity to exert greater political weight by the election of a slate or ticket backed by a political organization and both supported

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[30] Id., p. 160, l. col., 1st par.

[31] (D. C.—M. D. Tenn.—Oct. 10, 1963) 222 F. Supp. 684

[32] Id., p. 689, l. col., last par.

and publicized by a metropolitan press. The voter in a multi-county district has no such opportunity."

See also: **Preisler v. Doherty** (1955), 365 Mo. 460, 284 S. W. 2d 427 (11); **Graham v. Special Commissioners of Suffolk County** (1940), 306 Mass. 237, 27 N. E. 2d 995, 999, r. col., 1st par.; **Brophy v. Suffolk County Apportionment Com'rs** (1916), 225 Mass. 124, 113 N. E. 1040; and **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601, 602, r. col., last par.

In view of these authorities, it is clear that the combination of single and multi-member districts within a legislative chamber does not constitute invidious discrimination **unless** it results in an unjustifiable population disparity. **Therefore, it follows that if the Georgia legislature had not districted the seven most populous counties, but had merely apportioned the proper number of senators to each, then the structuring of the Senate would have satisfied all constitutional standards.**

Turning to the second difference referred to above, this Court may judicially know that the City of Atlanta is divided into eight wards with two aldermen from each, who are elected city-at-large,[36] and that this electoral practice epitomizes a widely prevalent method of electing municipal and county legislative bodies throughout the Nation.[37] Obviously, this method of electing repre-

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[36] Ga. Laws, 1952, pp. 2635-2637, Secs. 1, 3 and 4

[37] *The Municipal Yearbook* (1963), at p. 165, ftn. 2, states that:

"The 55 cities which elect at-large councilmen nominated by wards are: Ozark, Alabama; Tucson, Arizona; El Dorado, Arkansas; Alhambra, Compton, Long Beach, Newport Beach, Oakland, San Diego, San Leandro, Santa Ana, and Stockton, California; Greeley, Colorado; Wilmington, Delaware; Belle Glade, Bradenton, St. Petersburg, and Tampa, Florida; La-Fayette, Georgia; Lexington, Kentucky; Portland, Maine, Chelsea and Springfield, Massachusetts; Cadillac, Holland, Inkster, Jackson, and Lansing, Michigan; Columbia, Missis-

sentatives does not constitute invidious discrimination unless it should produce population disparities in voting strength.

Nevertheless, the Respondents contend that the county-at-large election of senators results in invidious discrimination against the voters in any senatorial district in Georgia which is comprised of less than an entire county because in any such district the representative chosen by the voters may be defeated by the votes of persons not residing in that district.

This contention is untenable. Upholding it would invalidate the method of electing a vast number of aldermen in cities across the Nation, not on the basis of ward population disparities, but simply because their charters require that the candidates from the various wards run city-at-large.

One of the reasons frequently attributed for Atlanta's good government is the fact that its aldermen are elected at-large with the result that they are permitted to consider measures in the light of the interests of the City as a whole, instead of being limited by parochial viewpoints engendered by ward election. If such a method of electing aldermen is beneficial for the City of Atlanta, they why would not the same method of electing senators be beneficial for Fulton County?

If this contention of the Respondents is sound, then it would not only invalidate a technique of apportionment

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sippi; Poplar Bluff and Springfield, Missouri; Concord, New Hampshire; Raritan, New Jersey; Niagara Falls, New York; Jacksonville, New Bern, and Rocky Mount, North Carolina; Elk City, Enid, Guymon, Midwest City, Okmulgee, and Pawhuska, Oklahoma; Springfield, Oregon; Charleston and Greer, South Carolina; Columbia, Tennessee; Dallas, Ennis, Hillsboro, Mesquite, and Nederland, Texas; Ogden, Utah; Clarkston and Sumner, Washington."

frequently built into state, county and municipal legislatures, but would also deprive the courts of one of their most effective remedies in eradicating legislative mal-apportionments. For example, suppose the legislature had required that Fulton's senators run only within their districts and had then drawn these district lines in such a manner as to create egregious population disparities among the districts. In eliminating this mal-apportionment, would it not be much better for the court to order a county-at-large election for the senators, rather than to undertake the making of the classic legislative judgments involved in drawing district lines? Obviously, such lines could not be drawn without affecting partisan interests.

Under the Senatorial Reapportionment Act, the seven most populous counties are divided into districts of substantially equal population. The sole purpose of this districting is to insure a dispersion of representation in each county. The legislature could have allotted the senators to each county without districting it, but this would have permitted the election of all the senators from the same part of the county.

In our consideration of these two differences (single and multi-member districts and county-at-large elections) we have found that both are equally inoffensive to constitutional standards. Consequently, why does the joining of these two differences in structuring the Georgia Senate produce invidious discrimination?

C. The Contours of Equal Protection.

In **Baker v. Carr**,[38] the plaintiffs contended that the structure of the Tennessee legislature effected a gross disproportion of representation to voting population, and thereby placed them in a position of constitutionally un-

[38] (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 961.

justifiable inequality. The majority opinion of this Court concluded that the "right asserted is within the reach of judicial protection under the Fourteenth Amendment."[39]

The concurring opinion of Justice Douglas in **Baker** casts a great deal of light upon the thinking of the majority. He defined the scope of the Equal Protection Clause in the following terms:[40]

> There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?
>
> The traditional test under the Equal Protection Clause has been whether a State has made "an invidious discrimination," as it does when it selects "a particular race or nationality for oppressive treatment." See **Skinner v. Oklahoma,** 316 U. S. 535, 541, 86 L. ed. 1655, 1660, 62 S. Ct. 1110. Universal equality is not the test; there is room for weighting. As we stated in **Williamson v. Lee Optical of Okla., Inc.,** 348 U. S. 483, 489, 99 L. ed. 563, 573, 75 S. Ct. 461. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

And Justice Stewart in his concurring opinion stated that:[42]

> In case after case arising under the Equal Protection Clause the Court has said what it said again

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[39] Id., 369 U. S. 237, 2d par., 7 L. ed. 2d 697, 1. col., last par.

[40] Id., 369 U. S. 244, 4th par., 7 L. ed. 2d 701, 1. col., 4th par.

[42] Id., 369 U. S. 266, 1st par., 7 L. ed. 2d 714, 1. col., 2d par.

only last Term—that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." **McGowan v. Maryland,** 366 U. S. 420, 425, 6 L. ed. 2d 393, 399, 81 S. Ct. 1101. In case after case arising under that Clause we have also said that "the burden of establishing the unconstitutionality of a statute rests on him who assails it." **Metropolitan Casualty Ins. Co. v. Brownell,** 294 U. S. 580, 584, 79 L. ed. 1070, 1072, 55 S. Ct. 538.

Today's decision does not turn its back on these settled precedents.

In **Reynolds v. Sims** (No. 23, this Term), the Court reiterated this rational by stating that:

We indicated in **Baker,** however, that the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative apportionment scheme, and we stated:

"Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects **no** policy, but simply arbitrary and capricious action" (32 L. W. 4541, 1. col., 2d par.).

These opinions clearly illustrate that this Court intends that the traditional tests under the Equal Protection Clause are the ones to be applied in determining the validity of state legislative apportionments. Obviously, this Court did not attempt to create any new judicial

standards for courts to apply when faced with a claim of arbitrary state action in the field of legislative apportionment.

In **Norvell v. Illinois,**[43] this Court had before it a case in which the petitioner was convicted of murder in a state court at a trial in 1941, in which he, though indigent, was represented by a lawyer. He was unable to obtain a transcript and did not pursue an appeal from his conviction. In 1956, the petitioner made a motion in which the trial court was requested to furnish a stenographic transcript of his trial. However, no such transcript was available due to the death of the court reporter. The state courts denied the petitioner a new trial and he filed his application for certiorari with this Court. Upon appeal, he relied upon **Griffin v. Illinois,**[44] holding on the facts of that case that it was a violation of the Fourteenth Amendment to deprive a person because of his indigency of any rights of appeal afforded all other convicted defendants.

This Court granted the application for certiorari and in an opinion by Justice Douglas, expressing the views of six members of the Court, held that under the circumstances the denial of post-conviction relief to the petitioner did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. This Court expressed its views on the scope of the Equal Protection Clause in the following terms:[45]

> As we said in **Tigner v. Texas,** 310 U. S. 141, 147, 84 L. ed. 1124, 1128, 60 S. Ct. 879, 130 A. L. R. 1321:

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[43] (1963), 373 U. S. 420, 10 L. ed. 2d 456, 83 S. Ct. 1366, reh. den., 375 U. S. 870, 11 L. ed. 2d 99, 84 S. Ct. 27.

[44] 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585, 55 A. L. R. 2d 1055.

[45] 373 U. S. 423, last par., 10 L. ed. 2d 459, r. col., 1st par.

". . . The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

When, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical accommodation must be made. We repeat what was said in **Metropolis Theatre Co. v. Chicago**, 228 U. S. 61, 69, 70, 57 L. ed. 730, 734, 33 S. Ct. 441.

"The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. . . . What is best is not always discernible; the wisdom of the choice may be disputed or condemned."

The "rough accommodations" made by government do not violate the Equal Protection Clause of the Fourteenth Amendment unless the lines drawn are "hostile or invidious". **Welch v. Henry**, 305 U. S. 134, 144, 83 L. ed. 87, 92, 59 S. Ct. 121, 118 A. L. R. 1142. We can make no such condemnation here.

In **Lindsley v. Natural Carbonic Gas Company**,[46] Mr. Justice Van Devanter speaking for a unanimous Court, held that:[47]

The rules by which this contention (violation of equal protection) must be tested, as is shown by

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[46] (1911) 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337.

[47] 220 U. S. 78, last par., 55 L. ed. 377, r. col., 3d par., 31 S. Ct. 340.

repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify * * * but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. **Bachtel v. Wilson**, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 S. Ct. 243; **Louisville & N. R. Co. v. Melton**, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676; **Ozan Lumber Co. v. Union County Nat. Bank**, 207 U. S. 251, 256, 52 L. ed. 195, 197; 28 S. Ct. 89; **Munn v. Illinois**, 94 U. S. 113, 132, 24 L. ed. 77, 86; **Henderson Bridge Co. v. Henderson**, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 S. Ct. 553.

In **McGowan v. Maryland**, 366 U. S. 420, 425-426, 81 S. Ct. 1101, 1104-1105, 6 L. ed. 2d 393, in referring to the question as to whether under the circumstances of that case charging that certain provisions of the state statute were arbitrary and capricious, this Court said:

> The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth

> Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. **A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.** (Emphasis added.)

In 1931 the late Mr. Justice Homes, speaking for this Court in **Bain Peanut Co. v. Pinson,** 282 U. S. 499, 501, 51 S. Ct. 228, 229, 75 L. ed. 482, said: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." See also: **Morey v. Doud,** 354 U. S. 457, 463-466, 77 S. Ct. 1344, 1 L. ed. 2d 1485 (1957).

In view of these authorities, it is clear that the State is to be allowed every reasonable latitude in the field of legislative apportionment, and any device therein will not be set aside if any state of facts reasonably may be conceived to justify it.

D. **The Rationality of County-at-Large Elections.**

Historically, the counties of Georgia are the basic units of representation and local government.[48] Georgia, since earliest times, has consistently emphasized county government and the county unitary approach. A county is a political subdivision of the State, created for administrative purposes, is representative of the sovereignity of the State and auxiliary to it. Its functions are of a public

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[48] See *Sanders v. Gray* (D. C.—N. D. Ga.—1962), 203 F. Supp. 158, at pp. 161-163

nature; it is political in character, and constitutes the machinery by and through which many of the powers of the State are exercised.[49] Consequently, the operation of county government over a period of years produces a degree of solidarity from economic, social and political causes. In other words, a county generally reflects a fairly solid unit of political thinking.

In **Reynolds v. Sims** (No. 23, This Term), this Court approved the practice of drawing state legislative districts according to county boundaries in the following terms:

> Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. . . . (32 L. W. 4547, r. col., 3d par.)
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> A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or his-

[49] Compare: 6 EGL, Counties, Sec. 2, p. 522.

torical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State. (32 L. W. 4548, l. col., 2d par.)

In **Lucas v. The Forty-Fourth General Assembly of the State of Colorado** (No. 508, this Term), the Court considered the constitutional significance of a majority of the voters: rejecting proposed Amendment No. 8 to the Colorado Constitution, which prescribed an apportionment plan pursuant to which seats in both houses of the Colorado Legislature would be apportioned on a population basis; and adopting proposed Amendment No. 7 which, on the other hand, prescribed apportionment for the lower house on the basis of population and the senate on the basis of population and various other factors. The appellees argued that this rejection by the electorate indicated a clear choice between competing methods of apportionment. This Court responded to this contention by stating that:

> However, the choice presented to the Colorado electorate, in voting on these two proposed constitutional amendments, was hardly as clear-cut as the court below regarded it. One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for

eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies within the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multi-member county represented the county as a whole. Amendment No. 8, as distinguished from Amendment No. 7, while purportedly basing the apportionment of seats in both houses on a population basis, would have perpetuated, for all practical purposes, the debatable feature of the existing scheme. Under Amendment No. 8, senators were to be elected at large in those counties given more than one Senate seat, and no provision was made for subdistricting within such counties for the purpose of electing senators. Representatives were also to be elected at large in multimember counties pursuant to the provisions of Amendment No. 8 at least initially, although subdistricting for the purpose of electing House members was permitted if the voters of a multimember county specifically approved a representative subdistricting plan for that county. Thus, neither of the proposed plans was, in all probability, wholly acceptable to the voters in the populous counties, and the assumption of the court below that the Colorado voters made a definitive choice between two contrasting alternatives and indicated that "minority process in the Senate is what they want" does not appear to be factually justifiable (32 L. W. 4562, r. col., 1st par.).

However, the Court was careful to point out in Lucas that: "We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are

constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties" (32 L. W. 4562, ftn. 21).

In view of these considerations, it is a rational and intelligible objective for the State to seek to preserve the political integrity of counties in the representation of interests in the General Assembly. The same advantages experienced by a multi-ward city whose aldermen run city-at-large, are also experienced by a multi-district county whose senators run county-at-large. These advantages to the city are well described in the following excerpt:[50]

> The election of councilmen by wards under normal conditions has certain obvious advantages. First, it gives the voter in the council election a short and simple ballot. Second, it gives him the opportunity of selecting someone living near him about whom it should be possible to get personal information. Third, insofar as the wards have peculiar and special interests, it provides means for their representation in the council.
>
> The people in the United States have in recent years been inclined to give more weight to the arguments against the ward system than to those in its favor. Residence within the ward has come to be almost everywhere a prerequisite to election from the ward.
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> Considering the manner in which people in cities draw themselves apart from each other for residence purposes, it is not surprising that some wards are left

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[50] *American City Government* (1950—Revised Ed.), by Anderson and Weidner, pp. 404-406. See also *Governing Urban America* (1955), by Charles R. Adrian, p. 233.

without adequate aldermanic material. Even the labor leaders may chance to be grouped all in one ward, and some of them may be in wards where they have no chance of election. The result is often a narrow restriction of the range of choice and in some wards the election to the council of men not up to the general standard. Furthermore, the basis upon which selection is made within the ward tends to be that of service to the ward instead of ability to serve the city. A ward alderman is expected to get something for his ward—some street improvement or a public building or at least work and help for needy constituents. If he must indulge in logrolling to get results, his action will be condoned by his constituents, whereas to come home with "clean but empty hands" is considered a proof of weakness in aldermen as well as in ambassadors. It scarcely needs to be said that many of the men who engage in such a scramble for spoils and ward improvements are a distinctive type whose presence in the council in large numbers is almost certain to give it a low moral tone.

The ward system gives very unequal results in the matter of representation. If the city be gerrymandered —and it is likely to be—then one of the parties is reasonably sure to be under-represented or at least to feel that it is. Even where the original ward lines are made carefully and honestly, the rapid shifting and growth of population in cities soon upsets the entire division of representation. Once established, however, and even when there was little reason for them in the first instance, ward lines tend to become fixed, almost unchangeable. It is not uncommon, therefore, to find cases of minority rule continued for years and even decades.

Other defects can easily be found. Ward lines are not, as a rule, the natural boundaries of distinct geo-

graphical areas or social groups but rather artificial or merely traditional limits. The aldermen elected from wards are never responsible to the city as a whole. Certain groups that have respectable numbers of voters but not enough to carry any ward may find themselves wholly unrepresented or very poorly represented by some fusion candidate. Indeed under the ordinary system of voting, even if the wards are all practically equal in population, the ward system of election may result in anything from absolute dominance of the council by a plurality party to a fair apportionment of representation among all groups and parties. To control the council a party needs only to carry a majority of the wards, and this it may do by a bare majority or plurality in each ward as the case may be.

Let us suppose a simple case of five wards, substantially equal, and only two parties, one of which is, however, handicapped by having a concentration of its voting power in one ward, which is not an uncommon case (see Table 24). The illustration here given may be considered an extreme case, but such cases are not entirely imaginary.

Table 24: A sample election by wards.

	Ward 1	Ward 2	Ward 3	Ward 4	Ward 5	
Party A vote	6,200	6,300	6,500	6,400	3,000	
Party B vote	5,800	5,700	5,500	5,600	9,000	
Aldermen elected	A	A	A	A	B	
Total vote, both parties, 60,000						100%
Total A vote, 28,400						47⅓%
Total B vote, 31,600						52⅔%

A members in council number 4, or 80 percent of total.

B members in council number 1, or 20 percent of total.

7,100 votes elected each A member; 31,600 votes succeed in electing only one B member.

The assumption behind the ward system of representation is that men are best represented on the basis of the geographical areas in which they live. Such an

assumption is less true today than it ever was. In a mobile and diversified population, men divide in a variety of ways—on the basis of their occupation, the level of their incomes, their religion, their racial and ethnic characteristics, their philosophies, their parties. A geographical factor may be added to this list, but it is only one of many items of importance, and it does not wholly conform to any of the others. If councilmen are elected at large, especially if by proportional representation, groups of voters do not have to rely upon geographical concentration of strength in order to assure themselves of representation.

Election at large—By the election of councilmen at large a city gains certain obvious advantages. Ward boundaries are for all practical purposes wiped out. Gerrymandering becomes impossible. The parties or other groups may put forward their best men, no matter where they live in the city. Being elected from and responsible to the city as a whole, the councilmen must put more stress upon general city-wide problems both in the campaign and in office than upon the special needs of little districts. Furthermore, when elected at large the council practically must be a small body. There is reason to believe, therefore, that somewhat abler men will be chosen.

By an Act approved September 24, 1959 (Pub. Law 86-380, 73 Stat. at L. 703), the Congress established an Advisory Commission on Intergovernmental Relations and assigned it the duties, *inter alia*, of encouraging discussion and study at an early stage of emerging public problems that are likely to require intergovernmental cooperation and of recommending, within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government.

On December 13, 1962, the Commission issued its Report entitled "Apportionment of State Legislatures",[51] which included the recommendation, *inter alia*, that "'Equal protection of the laws' would seem to presume, and considerations of political equity demand, that the apportionment of both houses in the State legislature, be based strictly on population."[52] Although the Commission is population oriented in apportionment matters, it nevertheless recognizes the value of preserving the territorial integrity of a county in districting. For instance, the Commission included within its conclusions and recommendations the following statement:

> Only one procedure has been developed that can eliminate the problem of drawing district lines. This procedure would base representation permanently on political subdivisions or on geographic areas which may or may not take population into consideration. Population may be a factor by permitting those units with larger populations to elect more than one legislator but by requiring all such legislators to be elected at large. Thus, the need to draw district lines after each apportionment is eliminated.

Furthermore, federal courts have frequently approved districting plans which utilized county lines. **Moss v. Burkhart** (D. C.—W. D. Okl.—1963), 220 F. Supp. 149, aff'd, sub nomine, **Williams v. Moss**, No. 476, this Term; **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601; Compare: **Baker v. Carr** (D. C.—M. D. Tenn.—1963), 222 F. Supp. 684.

These considerations clearly demonstrate that requiring at-large elections in multi-district counties is a rational and reasonable legislative objective which is not pre-

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[51] U. S. Government Printing Office, Washington 25, D. C.

[52] Id., p. 67, 2d par.

cluded by the Equal Protection Clause. Furthermore, the rationality of individual county representation is particularly apparent in Georgia where legislative action applicable only to one or more particular counties is traditional. The question before the Court is not whether the requirement of county-at-large elections is wise or unwise,[53] but simply whether it is invidiously discriminatory. Manifestly, the requirement reflects a rational policy fully consistent with the principles of the Equal Protection Clause. The Court should be loath to discard an operative system of government on the basis of the vague and untenable contentions of invidious discrimination advocated by the Respondents.

E. The Solemnity of the Challenged Enactment.

Soon after the enactment of the State Senatorial Reapportionment Act on October 5, 1962, doubt arose as to whether the Georgia Constitution permitted the Senators from the multi-district counties to be elected county-at-large.[54] In order to eliminate any question as to the validity of such at-large elections, the General Assembly adopted a Resolution[55] proposing an Amendment to the

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[53] It is well established that courts are not concerned with the wisdom of legislation, but only with the power of the legislature to enact it. *Ferguson v. Skrupa* (1963), 372 U. S. 726, 729, 1st par., 10 L. ed. 2d 93, 96, l. col., last par., 83 S. Ct. 1028, 95 A. L. R. 2d 1347; *Flemming v. Nestor* (1960), 363 U. S. 603, 611, last par., 4 L. ed. 2d 1435, 1444, r. col., last par., 80 S. Ct. 1367; *Railroad Retirement Board v. Alton Railroad Company* (1935), 295 U. S. 330, 346, 2d par., 79 L. ed. 1468, 1474, r. col., 1st par.; *Norman v. Baltimore & Ohio Railroad Company* (1935), 294 U. S. 240, 297, last par., 79 L. ed. 885, 897, l. col., 1st par.; and *Powell v. Pennsylvania* (1888), 127 U. S. 678, 686, 1st par., 32 L. ed. 253, 257, l. col., 1st par., 8 S. Ct. 992.

[54] See *Finch v. Gray* (Fulton Superior Ct.—No. A 96,441), and in particular the Orders of October 20 and 30, 1962.

[55] Ga. Laws, Sept.-Oct., 1962, Extra Sess., pp. 51-52.

Constitution whose chief significance was to expressly authorize and ratify this method of election. The proposal was submitted to the people at the 1962 General Election as a separate and distinct measure which was voted upon individually. If the people had rejected such proposal then the apportionment of the Senate according to population would not have been affected, except to the extent that the Georgia courts might finally have determined under the State Constitution that the Senators from the multi-district counties would have to be elected within their respective districts. Obviously, no catastrophe would have befallen the people had they rejected the proposed Amendment. Nevertheless, the people ratified the Amendment by a vote of 119,502 for and 75,598 against. The Amendment carried in each of the multi-district counties except Bibb.

Ratification of a constitutional provision by the people is the most solemn form of political enactment.

The preference of the people of Georgia for the Senators from the multi-district counties to be elected county-at-large, as expressed by constitutional ratification, negates the presence of invidious discrimination. Compare: **Davis v. Synhorst** (D. C.—S. D. Iowa—1963), 217 F. Supp. 492, at p. 498, r. col., 1st par.; and **Toombs v. Fortson** (D. C.—N. D. Ga.—1962), 205 F. Supp. 248, at p. 256, l. col., 2d par.

F. Rigidity in Legislative Apportionment Should Be Avoided.

American democratic government is still in the process of evolution, the latest seismic developments of which have been **Baker v. Carr** and **Reynolds v. Sims**. The state legislatures have frequently been recognized in their role as "testing laboratories" of the governmental process, whereby innovation and experiment may be un-

dertaken and later retained or rejected as the results dictate. Obviously, there is still much to be learned and many improvements possible in the application of the theory of representative government. Political scientists are presently studying systems of proportional representation,[56] cumulative voting,[57] limited voting,[58] and weighted voting.[59]

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[56] A system of elections for legislative bodies in which an attempt is made to secure the representation of all parties or points of view in approximately the same proportions as their supporters exist in the district. Provision is made for several representatives per district, and for securing representation for minorities. The *Model State Constitution*, drafted in 1948 by the Committee on State Government of the National Municipal League, calls for a single legislative chamber elected by proportional representation from districts of compact and contiguous territory, "from each of which there shall be elected from three to seven members, in accordance with the population of the respective districts." See also *Johnson v. City of New York* (1937), 274 N. Y. 411, 9 N. E. 2d 30; Phillip, *State and Local Government in America* (1954), p. 145, 3d par., p. 422, 4th par.; Brinkley and Moos, *A Grammar of American Politics* (2d ed.—1952), p. 964, last par.; and Clarence Gilbert Hoag and George Hallett, Jr., "Proportional Representation," New York, The Macmillan Company (1926).

[57] A system of representation in which the voter elects several members of a legislative body. He is given as many votes as there are seats to be filled, and can distribute his votes as he pleases, giving them all to one candidate if he so desires. See Phillip, *State and Local Government in America* (1954), p. 144, last par., p. 422, 3d par.; and George S. Blair, "Cumulative Voting," Urbana, University of Illinois Press (1960).

[58] A system wherein a voter may not vote for the full number of legislative seats to be filled in a district, thereby assuring in most cases that the minority party will elect some representatives. Phillip, *State and Local Government in America* (1954), p. 145, 2d par., p. 422, 2d par.

[59] A system in which a representative's vote is weighed according to the population of his district, number of actual votes cast for him, or other standard selected for weighting. See: Report, "Apportionment of State Legislatures," *Advisory Commission on Intergovernmental Relations* (Dec. 1962), p. 31, last par.; Gordon E. Baker, *State Constitutions: Reapportionment* (*National Municipal League* (1960), pp. 33-34; Robert H. Engle, "Weighting Legislators' Votes to Equalize Representation," Western Political Quarterly, 12:442 (1959); Gus Tyler, "What is Representative Government," *The New Republic* (July 16, 1962), p. 18.

These considerations coupled with the lessons of history demonstrate that the institutions of representative government will continue to be confronted with changing conditions, circumstances and problems. This fact of history argues strongly for the enunciation of fundamental governing standards in terms sufficiently broad to assure that the essence of any given standard will be preserved when applied in a climate of circumstances not anticipated at the moment of authorship. Absolute rigidity should be avoided. Yet, the Respondents in this case attempt to invoke a rigid interpretation of the Equal Protection Clause by attacking the requirement of at-large elections for senators from the multi-district counties, while conceding that such counties have been apportioned their fair share of senators according to population. This contention has no more merit than one seeking to force a state to adopt a system of proportional representation, cumulative voting or limited voting, in order to afford an opportunity for a minority party to elect its own representative. Obviously, such contentions are unsound today, and if adopted, could not withstand the test of time. .

Even a cursory look across the Nation, reveals a vast variety of technique in the apportioning and districting of state, county and municipal legislative bodies. The increased emphasis and study now being given these matters promises a rapid proliferation of new techniques in this area. In the face of these present circumstances and impending changes, the courts cannot afford to shackle this development and experimentation with such rigidity as is advocated by the Respondents, but rather the courts should rely on broad formulas designed solely to prohibit unconstitutional debasement of voting strength.

A further example of this variety is found in **Blaikie v. Powers.**[60] The court held in this case that the New York

[60] (1963), 13 N. Y. 2d 134, 243 N. Y. S. 2d 185.

City charter provision establishing limited voting by which each voter can vote for only one of the two candidates for office of councilman at-large from his borough, which is entitled to two councilmen at-large, does not violate the Equal Protection Clause. A dissenting opinion was filed in this case which relied in part on the "one man-one vote" formula stated in **Gray v. Sanders** (372 U. S. 368).

On appeal to this Court, the plaintiffs presented the following question:

> Does New York City Charter provision violate Fourteenth Amendment's Due Process and Equal Protection Clauses by disenfranchising electorate and diluting, restricting, and limiting their votes by denying them right to cast their ballots and have their votes counted for all elective offices, and by denying political organizations and their members right to nominate and elect candidates to fill all public offices (32 L. W. 3229).

Nevertheless, on January 13, 1964, this Court in a *per curiam* opinion granted the motion to dismiss for want of a substantial federal question. 32 L. W. 3254.

There is no invidious discrimination in this case because there is no dilution of voting strength. Each voter in Georgia has a substantially equal voice in the election of State senators irrespective of the fact that there is a variation in the structure of constituencies because of the employment of single and multi-member districts. This case presents nothing more than a political debate which addresses itself to the legislature.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment below reversed should the Court find that it has no jurisdiction of the direct appeal in Case Number 1213, in the Supreme Court of the United States, October Term, 1962, **Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, Appellant, v. James W. Dorsey, Dan I. MacIntyre, III, and James Edward Manget, Appellees.**

Respectfully submitted,

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June 26, 1964.

IN THE

Supreme Court of the United States

October Term, 1964

Number 226

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,

Petitioner,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Before Judgment

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

James W. Dorsey, Dan I. MacIntyre, III and James Edward Manget, Respondents in the captioned case, hereby file this reply to the Petition for a Writ of

Certiorari to the United States Court of Appeals for the Fifth Circuit, which was filed by Ben W. Fortson, Jr., Secretary of State of the State of Georgia.

The case that this Court is being asked to review on certiorari is identical to and is the same case now before this Court on direct appeal from a Three Judge Court convened in the Northern District of Georgia. The case now before the Court on direct appeal is docketed as Number 1213 of the October Term, 1963 and is styled *Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, Appellant,* vs. *James W. Dorsey, Dan I. MacIntyre, III, and James Edward Manget, Appellees.*

The petitioner herein has set forth in his petition for a writ of certiorari that he is proceeding both by direct appeal and by way of appeal through the Court of Appeals in order to assure that he has chosen the proper avenue to have his case heard by this Honorable Court. The respondents herein have not challenged the jurisdiction of this Court in the action now before this Court on direct appeal, but rather have appeared and have filed with the Court a motion to affirm the judgment of the lower court.

The respondents herein have filed a motion in the United States Court of Appeals for the Fifth Circuit to dismiss the action pending in that Court on the ground that that Court has no jurisdiction over this appeal. This petition for a writ of certiorari is brought before a judgment.

The respondents herein only desire to point out to this Court that this case is presently pending before this Court and that the decision of this Court in case number 1213 will dispose of the issues and will control the case

pending in the Court of Appeals for the Fifth Circuit, if said case is properly before that Court. If the petition for a writ of certiorari is granted, the effect would be to have one case involving the same parties pending in two separate cases before this Honorable Court. There is no legal or equitable reason to warrant the granting of the petition.

The respondents herein do not intend to file a brief of law in this case, but refer the Court to the Motion to Affirm with brief of law filed in case number 1213 of the October Term, 1963 involving the same parties herein.

WHEREFORE, the Respondents respectfully pray that the petition for writ of certiorari be denied and that a writ of certiorari not be granted, but that the Court dispose of this case and the direct appeal presently pending before this Court.

Respectfully submitted,

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